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Lucia A Keegan 08/03/2006 09:47:07 AM From DB/Inbox: Lucia A Keegan

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UNCLAS SENSITIVE PARIS 05242

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UNCLAS SECTION 01 OF 03 PARIS 005242

SIPDIS

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DEPT FOR EB/IPC AND EUR/WE
DEPT PLS PASS TO USTR FOR JSANFORD/VESPINEL/RMEYERS
COMMERCE FOR S JACOBS, S WILSON
DOJ FOR C HARROP, F MARSHALL, R HESSE
COMMERCE PLEASE PASS TO USPTO

E.O. 12958: N/A
TAGS: KIPR ETRD PGOV FR
SUBJECT: COURT UPHOLDS FRENCH COPYRIGHT LAW

REFS: A) PARIS 4458
B) PARIS 3153
C) PARIS 1847

Summary

¶1. (SBU) The French Constitutional Court in a July 27 decision upheld the new copyright law, throwing out four provisions as unconstitutional. Specifically, the court ruled that collaborative file-sharing, contravention of protected works online, and bypassing of technical protective measures should be treated no more leniently than other cases of copyright infringement. Additionally, the court upheld forced interoperability, but added that there should be compensation.

¶2. (SBU) Having survived an appeal challenging it on both procedural and substantive grounds, France's new copyright law will very soon be on the books, but it far from closes the debate -- or the confusion -- about the right to private copy and forced interoperability. The next milestone worth watching will be the creation of the new Regulatory Authority for Technical Measures and the appointment of its decision-makers, since this new "legal monster" will have to decide such important unresolved matters as defining the principle of interoperability. End summary.

The Court Rules

¶3. (SBU) Late on July 27, the French Constitutional Court released its much-anticipated ruling on the appeal submitted in early July by

some 60 French parliamentarians against the new copyright law, originally designed to transpose the European Union Copyright Directive (EUCD). Their appeal was focused on two issues: procedural objections as to how the law was passed with limited debate, and substantive objections charging that the law as passed catered to big companies and sacrificed consumer interests. The court rejected the procedural objections and largely upheld the law. In certain substantive areas, the court's ruling actually is a blow to those who brought the appeal, since it increased protections for rights-holders and raised fines for online infringement, i.e. illegal downloading.

¶4. (SBU) Four years into the legislative process to transpose the EU Copyright Directive (EUCD), an originally straight-forward and technical effort to fight counterfeiting and piracy in the information society turned into a protracted battleground over civil liberties, privacy protection, interoperability and open-source software. Although the much-debated bill cleared its last legislative hurdle with a successful vote in the National Assembly in late June, the proponents of the right to private copy and government-enforced interoperability felt the so-called "iPod law" was overly slanted toward business interests. Not only did the court decision not satisfy them, but it also came down more harshly against file-sharing and internet-based copyright infringement than many expected.

The court decides to leave all sides unsatisfied

¶5. (SBU) The Constitutional Court largely upheld the law, but ruled four provisions unconstitutional. First, the court said that the interoperability provisions (namely those which require companies to ensure that digital files are playable on devices manufactured by other companies) need to be more clearly defined. At issue was the proprietary software -- used frequently by online music stores, most notably Apple's iTunes -- to encrypt files so that they can only be played on some devices but not others. As it emerged from the Court, the law would largely permit digital anti-piracy measures. However, device-makers could petition the soon-to-be-established Regulatory Authority for Technical Measures, if they fail to reach an agreement by direct negotiation with Digital Rights Management (DRM) rights-holders to share information which would allow access to protected files on their devices. The regulatory authority could then force the technical protective measures to be shared in order to allow interoperability, but the Court made clear that any forced sharing of the technologies behind such measures should be compensated. The Court decision was silent on who would decide on the indemnification, but one copyright legal expert thought such a decision would most likely be made by the civil court rather than the new regulatory authority.

¶6. (SBU) Second, the court ruled that Articles 21, 22, 23, and 24 were unconstitutional. Article 21 would have exempted from anti-infringement provisions developers working on collaborative software, research or using file sharing to work on things not subject to royalties or any other monetary compensation. The Court effectively erased this exception. According to the court, such an exception would wrongly infringe the work's rights-holders, taking away coverage of their intellectual property just because they may have renounced any remuneration. One copyright expert portrayed the elimination of the law's so-called "fair use" provision as a new problem of legal liability for file-sharers outside of the universe of commercial music, video, and other remunerated works. Given the decision, any French developers working on such software could be sued by DRM software producers or copyright holders -- even when it concerns only software intended for non-copyrighted content. So, no matter whether someone in France uses peer-to-peer software for some distributed business model or just to share an un-copyrighted piece of music -- perhaps a work-in-progress willfully shared online by its author(s) -- it is illegal.

¶7. (SBU) Articles 22 and 23 were declared unconstitutional because the Court ruled they unjustly lifted all penalties against bypassing technical protective measures, thereby removing the most basic intellectual property protections of such measures, when their circumvention is for the sake of interoperability. The interoperability exception to the rule against changing (infringing) copyrighted works, namely technical protective measures, was supposed to open up competition and protect software developers.

But the court deleted this exception by declaring it unconstitutional, effectively accepting arguments submitted in a brief to the court by the Business Software Alliance. Much to the dismay of consumers and, in particular, the French Internet Music Users Association (Association des Audionautes), the court declared that hacking into a DRM just because a consumer finds that it lacks interoperability is unacceptable and, indeed, illegal. Likewise, without prior authorization, it will not be possible to develop software that could interact with DRM-encumbered content. This is as true for free software developers, who are sure to protest loudly, as it is for everyone else.

¶8. (SBU) Lastly, the court ruled against Article 24, which violated the principle of equal protection under the law. Legislators, arguing that online piracy was less serious than unlawful commercial reproduction of copyrighted works, had inserted a provision in Article 24 that would have punished internet users with fines of only 38 or 75 euros, scarcely more than a typical parking ticket. More serious penalties were to be reserved for "commercial" pirates. The court struck down this provision. As a result, online pirates or internet users who illegally download copyrighted materials can be sued under the default procedures for counterfeiting and risk up to five years in prison and 500,000 euros. French Culture Minister Renaud Donnedieu de Vabres issued a communique criticizing this part of the court decision, saying he "deplored" the increase of sanctions against illegal downloading. The compromise that the GOF had struck during the drafting of the law was designed, he explained, to "reserve the most serious penalties for the most serious crimes."

A long and drawn out legislative process

¶9. (SBU) This attitude was common throughout the parliamentary debate. The implementation procedure of the EU Copyright Directive (EUCD) began normally enough in 2001-2002. The initial draft law on authors' and related rights in the information society, or DADVSI in French, was jointly developed by the Government and the High Council on Literary and Artistic Work Property (also known as the High Council on Copyright), which represents the GOF, industry and consumers (but not internet users). A change in the political majority from Socialist to center-right following the national elections of Spring 2002 and then the nomination of Renaud Donnedieu de Vabres as the new Culture Minister in 2004 contributed to the first of many delays.

¶10. (SBU) By the time the DADVSI bill was finally presented to Parliament in late December 2005, France had already implemented the EU directive on e-commerce in 2004, citing as one of its goals to "restore confidence in e-commerce" and introducing the notion of "open standards." According to a parliamentary staffer, the French e-commerce "precedent" encouraged the French National Assembly and Senate to "add their grain of salt instead of just rubberstamping EU implementing legislation" as they had often done in the past. Despite the fast track procedure chosen by the GOF, the resulting legislative process took another seven months and led to an almost complete overhaul of the original text, in what had by then become a highly controversial national debate.

Legal monster of (yet another) regulatory body is born

¶11. (SBU) Many French copyright lawyers have serious concerns about the enforceability of the law with its layers of provisions representing conflicting interests. A new, and already much-decried "Regulatory Authority for Technical Measures" will be in charge of enforcing the right to private copy and interoperability. When access to information essential to interoperability is denied, any publisher of computer software, any maker of a technical system, and any technical service operator can ask the regulatory authority to obtain that information from the rights holder. Once initiated, they have two months to deliver the information and/or render a ruling. At least that is how the law reads, but we have been unable to find a single defender of this new regulatory authority. Instead we have a long list of lawyers and industry experts who fear this new "legal monster" with a poorly defined mission but extensive powers. The State Council (Conseil d'Etat) will set by decree the rules of procedure for the new regulatory authority. The deciding panel of six judges for the authority will consist of one judge from the State Council, one from the Court of Cassation (Cour de

Cassation), one from the Accounting Court (Cour des Comptes), one IT expert appointed by the President of the Technology Academy, one representative of the High Council on Copyright, and one representative from the Private Copy Commission (set up some twenty years ago to monitor the right of private copy for music and video tapes).

Comment

¶12. (SBU) The new copyright legislation on authors' and related rights in the information society is now de facto law. It will become law de jure once it is published in the French Official Journal in the coming days. However, this is far from the end of the long debate over French copyright law -- a debate which is already being echoed elsewhere in Europe. Despite the ruling of the Constitutional Court, many of the questions raised in France during the legislative process remain unanswered and are not likely to find a solution before the new Regulatory Authority for Technical Measures is called into play.

¶13. (SBU) During the frequently bitter parliamentary debate, the GOF appeased the advocates of private copy and interoperability by agreeing to include provisions that were in part struck down by the court. Many of the surviving portions remain questionable. Ultimately, the new regulatory authority will have to take the hard decisions the Government refused to take. End Comment.

Stapleton